



The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy

Author(s): William B. Herlands, William T. Andrews, John R. Bartels, Edgar E. Barton, Leonard L. Berliner, Herbert Brownell, Jr., William J. Butler, Barrett Carmody, Allison Dunham, Sidney A. Fine, George G. Gallantz, Ben Herzberg, Alvin E. Heutchy, Richard W. Hogue, Jr., Paul A. Landsman, Robert E. Lawther, Arthur M. Loeb, Walter A. Morris, Jr., Joseph Morse, William G. Mulligan, Jr., William Curtis Pierce, Abraham Shamos, Harold Roland Shapiro...

Source: *American Bar Association Journal*, Vol. 37, No. 2 (February 1951), pp. 123-126

Published by: American Bar Association

Stable URL: <http://www.jstor.org/stable/25717548>

Accessed: 13-06-2016 21:44 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
<http://about.jstor.org/terms>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



American Bar Association is collaborating with JSTOR to digitize, preserve and extend access to *American Bar Association Journal*

The Proposed Anti-Communist Oath:

Opposition Expressed to Association's Policy

■ At the Annual Meeting of the American Bar Association in Washington, D. C., last September, the Assembly and House of Delegates approved a resolution declaring that "it is not inappropriate, with world conditions as they are, that any American citizen be required to attest to his loyalty to our form of government by anticommunist oath, and that it is especially appropriate that all licensed to practice law in the United States of America be required so to do . . ." The resolution requested that each member of the Bar be required "within a reasonable time and periodically thereafter . . . [to] file an affidavit stating whether he is or ever has been a member of the Communist Party or affiliated therewith . . ." (see 36 A.B.A.J. 972; November, 1950).

This resolution represents the official position of the Association. The Editors of the JOURNAL have received communications from some members of the Association stating that they are opposed to this policy and expressing the hope that the matter will be reconsidered in February at the Mid-Year Meeting of the House of Delegates at Chicago. Because of the interest in and importance of the subject, we publish here three of these communications. The JOURNAL is not to be regarded as supporting these views which are in opposition to Association policy. An editorial on page 128 explains that policy.

Twenty-Seven Members State Reasons for Opposition

The attitude of those who are opposed is explained in their communications, the first of which is a petition signed by twenty-six members of the Association:

The undersigned members of the American Bar Association oppose the requirement that all lawyers take a special anti-Communist oath, with periodic repetition, such as is urged upon all state authorities by the resolution adopted without debate by the House of Delegates and Assembly of the Association at the September, 1950, Annual Convention.

Every lawyer, upon his first admission to the local Bar, has been called upon to take an oath of allegiance and loyalty to the Federal and State constitutions, and adherence to honorable, professional purpose and practice. Many lawyers have taken such oaths more than once—upon admission to practice in the Federal courts, upon assuming public office, and otherwise. There is no evidence or even any charge of which we are aware, that more than an infinitesimal fraction of the approximately 200,000 lawyers throughout the United States are concealed members of the Communist Party or supporters of any subversive movement.

The requirement of this new oath, moreover, will not in our judgment reveal the disloyal in our midst, whoever they may be. The true com-

munist or supporter of violent and illegal overthrow of the Government will, by the very nature of his belief and illegal acts, swear falsely, even at the risk of disbarment for perjury. Nor will any oath, however often repeated, deter from such belief and conduct one who is so perverted as to have already embarked upon such dirty waters. No substantial gain can result from the imposition of this oath requirement.

The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample, in our belief, to meet any danger to our government or disgrace to our profession. National and local law enforcement agencies, courts, bar associations, and grievance committees are fully alert to existing danger from communists in our midst, whether avowed or concealed.

We, therefore, oppose this method of intended detection as repetitious of the universally required initial professional oath, as unfounded in its implication of widespread disloyalty and illegal acts on the part of lawyers generally, and as unproductive of the hoped-for result. It violates the American tradition that suspicion of disloyalty shall not be cast upon an entire class or profession upon the chance of catching a few random delinquents. To divert or dull the force of that tradition now by a misplaced reliance

The Proposed Anti-Communist Oath

on an illusory safeguard would be most unfortunate.

George W. Alger
New York City
Horace E. Allen
Springfield, Massachusetts
Ernest Angell
New York City
Charles F. C. Arensberg
Pittsburgh, Pennsylvania
Laird Bell
Chicago, Illinois
C. C. Burlingham
New York City
Zechariah Chafee, Jr.
Cambridge, Massachusetts
Grenville Clark
Dublin, New Hampshire
Cyril Coleman
Hartford, Connecticut
John W. Davis
New York City
A. Crawford Greene
San Francisco, California
Frank W. Grinnell
Boston, Massachusetts
John L. Hall
Boston, Massachusetts
Henry C. Hart
Providence, Rhode Island
Charles M. Lyman
New Haven, Connecticut
Ross L. Malone, Jr.
Roswell, New Mexico
Robert McC. Marsh
New York City
George W. C. McCarter
Newark, New Jersey
John Lord O'Brian
Washington, D. C.
Owen J. Roberts
Philadelphia, Pennsylvania
Clement F. Robinson
Portland, Maine
Whitney North Seymour
New York City
Henry Upson Sims
Birmingham, Alabama
Henry W. Toll
Denver, Colorado
Harrison Tweed
New York City
Bethuel M. Webster
New York City

New York City Association Votes Against Oath

The following report and resolution were submitted by the Committee on Law Reform of The Association of the Bar of the City of New York

and were approved by that Association on December 12, 1950:

Recent proposals for "loyalty oaths for lawyers" have led the Committee on Law Reform to consider the need for and the wisdom of such oaths in New York. The committee's study of this question has led it to conclude that such oaths for lawyers are neither necessary nor wise.

The term "loyalty oath" is of itself somewhat ambiguous. In a sense, it may fairly be said that every member of the Bar of this State has already taken one. Section 466 of the Judiciary Law provides that: "Each person, admitted [to the Bar] as prescribed in this chapter must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose."

The constitutional oath of office in this State is prescribed by Article XIII, § 1 as follows: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability." This section of the Constitution requires that the oath be taken by members of the legislature, and all officers, executive and judicial (except such inferior officers as shall be by law exempted) before they enter on the duties of their respective offices. The section also provides that no other oath or declaration shall be required as a qualification for any office of public trust.

In addition, the Rules of Civil Practice forbid the Committees on Character and Fitness to certify any applicant for admission to the Bar unless he furnishes satisfactory proof that "he believes in the form of the government of the United States and that he is loyal to such government." (R.C.P., Rule 1 [f] [1], as amd. eff. Nov. 15, 1950.) This provision, in substantially similar language, has been part of the Rules since 1921.

The American Bar Association

has now formulated a proposal for an "anti-Communist oath." The proposal appears to proceed on the theory that an oath such as the New York constitutional oath of office is inadequate and that a much broader oath should be required to be taken periodically by every person who is now a member of the Bar of any state. This proposal is embodied in a resolution, a copy of which has been set forth in full as an appendix to this report, and which was adopted by the American Bar Association's General Assembly and House of Delegates at their recent annual meetings in Washington. The committee has been advised that the resolution was introduced from the floor and that it was adopted at the closing hours of the meetings with little debate in the General Assembly and with no debate in the House of Delegates.

Before proceeding in this report to comment upon the American Bar Association proposal, it is perhaps appropriate to define the scope of the question actually considered by the committee. To begin with, it should be understood that the submission of this report is in no way intended as an expression of views as to the efficacy or wisdom of loyalty oaths in general. There are many shades of opinion in this controversial field. Some hold the view that under no circumstances do loyalty oaths serve any useful purpose. The committee took no position, for the purposes of its discussions and of this report, as to whether or not "anti-Communist oaths" may be appropriate and necessary at certain times and in certain fields of endeavor.

The committee recognized that some of the arguments against such oaths for lawyers might also be applicable to "anti-Communist oaths" in other professions or activities. The committee considered the question only as it affects lawyers and the expression of its conclusion in these narrow terms is in no way intended to suggest that loyalty oaths are desirable or undesirable in any other business or profession.

Thus confined, the question considered by the committee was: Should the filing of an oath that the lawyer has never belonged to or supported certain organizations become a prerequisite to the continued practice of law in New York?

The committee recommends that this question be answered in the negative. The recommendation is based on the conviction that safeguards already in existence are adequate to deal with any lack of loyalty or integrity at the Bar. The committee is also of the view that the establishment of the oath requirement would be seriously detrimental to the profession for reasons more fully set forth below.

At the threshold of the consideration of this problem is the question whether there is any need for the establishment of such a requirement among lawyers. It has not been suggested that there is, at the Bar, any indication of a situation resembling that alleged to have existed, for example, in the labor relations field where under certain circumstances such an oath is required by the Taft-Hartley Law. Indeed, the almost 200,000 lawyers of the country, in their daily activities on behalf of their clients and otherwise, in court and out, are constantly and affirmatively demonstrating their loyalty and devotion to Constitution and country. In so far as some may believe that acts to which the proposed oath can fairly be related have manifested themselves or may manifest themselves in the future, remedies other than such oaths are sufficient.

The oath New York lawyers are required to take now and the existing machinery for the discipline of breaches of that oath and of fair standards of professional conduct give ample assurance that no act either disloyal or disruptive of the administration of justice is likely to go unpunished. This Association has demonstrated that it will take prompt steps to bring before the courts for discipline those lawyers who have violated established standards of professional conduct.

The committee therefore con-

cluded that no need for the oath was apparent and that none had been demonstrated. But entirely apart from the question of necessity, there are important affirmative ways in which the oath requirement could operate to undermine some of the traditions and principles of an honorable profession.

The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. At this time, when Communists are being more frequently called upon to appear in the courts, it is essential that they should not be deprived of their conceded right to be represented by counsel of their own choice. A lawyer might hesitate to represent accused Communists lest it be said that such representation constituted support of an organization of the prohibited kind.

The proposed oath raises constitutional questions which need not be elaborated here. A lawyer who has already sworn to support the Constitution might conscientiously refuse to subscribe to an oath which may violate that same Constitution. In view of the lack of necessity for the oath, it is undesirable to place lawyers in such a dilemma.

The oath proposed by the American Bar Association does not distinguish between lawful and unlawful conduct. It contemplates that the confession of several kinds of affiliation will necessarily lead to investigation and possibly to disbarment. Yet the kinds of affiliation which may lead to disbarment are nowhere defined. These are apparently to be left to later definition by investigating agencies or the courts, a method which does not commend itself either to the public or to a profession which is so constantly concerned with the delicate task of defining acts for which punishment shall be inflicted.

The committee has concluded that for these reasons the suggested oath should be rejected. Although this conclusion is not based on constitutional grounds, it should also be noted that grave constitutional ques-

tions might arise if such a condition to the practice of the law were to be imposed.

Even the anti-Communist oath requirement in the Taft-Hartley Law raised "difficult" First Amendment questions. *Communications Association v. Douds*, 339 U. S. 382, 390 (1950). And there, it had been found by Congress that Communist Party membership had been directly related to political strikes tending to cripple the country in time of crisis. Even so, the Chief Justice noted that the statute there under consideration does not require the oath as a condition to continued practice of one's chosen profession nor even as a condition to continuing as a member of a trade union.

Another constitutional question is suggested by the holding of the Supreme Court of the United States shortly after the Civil War, that oaths as to past conduct cannot be required as a prerequisite to continued practice before the Bar of that Court. *Ex Parte Garland*, 71 U. S. 333 (1866).

While these cases are not advanced as direct authority on this question, their holdings emphasize the gravity of the problem presented. The committee considers them to be an additional element requiring the rejection of the proposal for anti-Communist oaths for lawyers.

Adoption of the following resolution is therefore proposed:

RESOLVED, that The Association of the Bar of the City of New York opposes the adoption in this State of any legislation or rule of court which would require lawyers, as a condition of their right to continue to practice their profession, to subscribe to any oath or declaration other than the constitutional oath of office now required by Section 466 of the Judiciary Law.

Respectfully submitted,
THE COMMITTEE ON
LAW REFORM

WILLIAM B. HERLANDS, *Chairman*
WILLIAM T. ANDREWS
JOHN R. BARTELS
EDGAR E. BARTON
LEONARD L. BERLINER
HERBERT BROWNELL, JR.

The Proposed Anti-Communist Oath

WILLIAM J. BUTLER
BARRETT CARMODY
ALLISON DUNHAM
SIDNEY A. FINE
GEORGE G. GALLANTZ
BEN HERZBERG
ALVIN E. HEUTCHY
RICHARD W. HOGUE, JR.
PAUL A. LANDSMAN
ROBERT E. LAWTHY
ARTHUR M. LOEB
WALTER A. MORRIS, JR.
JOSEPH MORSE
WILLIAM G. MULLIGAN, JR.
WILLIAM CURTIS PIERCE
ABRAHAM SHAMOS
HAROLD ROLAND SHAPIRO
PAUL WINDELS, JR.

Massachusetts Bar Disapproves Association's Stand

The following letter was received from Frank W. Grinnell, of Massachusetts, expressing the views of the Executive Committee of the Massachusetts Bar Association:

At the monthly meeting of the Executive Committee of the Massachusetts Bar Association on November 16, 1950, the resolution in regard to oaths by lawyers adopted by a majority of the House of Delegates without debate, as printed in the November JOURNAL on page 972, was called to the attention of the Committee.

After consideration the committee "upon motion duly made and seconded unanimously

"VOTED: That this Committee go on record as disapproving the resolution adopted by the American Bar Association proposing a loyalty oath for members of the bar and that this vote be communicated to the American Bar Association."

Very truly yours,

FRANK W. GRINNELL, Secretary

Atlanta and Dallas Regional Conventions

■ At the meeting of the Board of Governors of the American Bar Association in September, 1950, a resolution was adopted which established a plan for holding four Regional Conventions each year in various areas of the United States.

This plan is a permanent part of the Association's activities and was adopted for the purpose of bringing the Association and its activities closer to the lawyers of America and to enable them by a reduction of distance and expense to attend the meetings of the Association.

The first Convention will be held at Atlanta, Georgia, March 7-10, and the second at Dallas, April 16-21. Arrangements for the third and fourth meetings are not yet complete. The pattern for these meetings has been set up and the principal features will be substantially the same.

The main features include a "workshop" for the practical benefit of lawyers in their everyday practice and will include discussions or institutes on "Trial Tactics", "Legal Draftsmanship", "Taxation", and "Law Office Management". A second division will be devoted to public relations and will include a discussion of "The Perils of Socialization of the Practice of Law", together with the presentation of a practical plan of procedure which may be

adopted by state and local associations in an effort to meet the actual problems involved in this field. A third division will be devoted to a discussion of the world situation.

In addition to the foregoing there will be six Section meetings of the American Bar Association, meetings of the Junior Bar Conference and of the Conference of Bar Presidents, a "Probation Demonstration" for the benefit of judges, and various types of entertainment for the lawyers and all ladies in attendance.

States included in the Atlanta Convention area are Florida, Georgia, North Carolina, South Carolina, Mississippi, Tennessee and Alabama.

States included in the Dallas Convention area are Texas, Louisiana, Arkansas, Oklahoma and New Mexico. Further details of plans for the Dallas meeting will be published in the March issue of the JOURNAL.

A few of the speakers who have accepted invitations to speak at one or both of these Conventions are Harold E. Stassen, President University of Pennsylvania; Harold R. Medina, Judge of the United States District Court for the Southern District of New York; John W. Davis, of New York; Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey; Gordon Dean, Chairman of the United States Atomic Energy Commission; Carrol M. Shanks, President

of Prudential Insurance Company of America; Dr. Sanchez-Majorado, former President of the Mexican Bar Association; John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit; Nelson A. Rockefeller of New York City; Herman E. Talmadge, Governor of Georgia; Gordon Browning, Governor of Tennessee.

A few of the speakers on the workshop program are Reginald Heber Smith, Boston, Massachusetts; Herbert W. Clark, San Francisco, California; Kurt Pantzer, Indianapolis, Indiana; Alan Loth, Fort Dodge, Iowa; Thomas M. Tarleau, New York City; Israel Smith, Tyler, Texas; Herbert F. Goodrich, Judge of United States Court of Appeals for the Third Circuit; John McClure, Washington, D. C.; Paul Carrington, Dallas, Texas; Edward L. Wright, Little Rock, Arkansas; Charles W. Joiner, University of Michigan Law School, and Dan Moody, Former Governor of Texas.

Local over-all directors of the meetings are E. Smythe Gambrell, of Atlanta, and Robert G. Storey, Dean of Southern Methodist University Law School, Dallas, Texas.

Advance registration and hotel reservation committees have been set up, together with an effective and working series of committees for both meetings.